No. 2572

IN THE

# United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT

G. J. BUCHLER,
Appellant,

vs.

W. W. BLACK, FRANK L. BELL and SUNSET COPPER MINING COMPANY, a corporation,
Appellees.

## APPELLEES' BRIEF

*Upon Appeal from the United States District Court for the Western District of Washington, Northern Division.*

FRANK L. BELL,
*Solicitor and Counsel, in person, for Defendant Bell,*
Glens Falls, N. Y.

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## BRIEF FOR APPELLEES.

*Upon Appeal from the United States District Court for the Western District of Washington, Northern Division.*

This case is brought into this court on a writ of error (page 191). The action is in equity by a single minority stockholder suing individually to impress a constructive trust upon thirty-six unpatented mining claims located in the State of Washington, on which applications for patents have been made by the defendants Black and Bell, also one-half of a section of land which is wholly within the area covered by the patents applied for (page 5).

This action was commenced March 27, 1912, (page 21) and came on for trial before Judge Neterer at Seattle on April 12, 1914 (page 93), and resulted in a dismissal of the action (page 88).

Plaintiff's bill is founded on fraud and collusion and the allegations on which he seeks relief are briefly as follows:

That in the year 1903 the defendant Corporation had a capital stock of two million dollars divided into two million shares of the par value of one dollar each (page 4). That in said year this stock was wrongfully increased to three million shares and a large part of these shares issued to one W. H. Baldwin at two and one-half cents per share, although he agreed to pay ten cents per share. That this increase was void and the issue thereof to Baldwin was void (page 6).

That between the years 1902 and 1906 in a scheme to defraud the minority stockholders and to convert the assets of the Corporation to the use of said Black and Bell they, with said Baldwin and one McNutt, caused the said Sunset Company to issue to one Ellen C. Baldwin, eight notes amounting to $29,384.10, and to secure them by a mortgage on the property of the corporation. That the notes were without consideration (pages 7, 8). It is not charged that any of the persons named were trustees of the corporation except said Black.

That in the year 1908, said Black with one McNutt, one Sellingham, one Davis and one Metzger were made trustees of the Sunset Company, the said W. H. Baldwin having died previous to the meeting (pages 8, 9). So

far as the complaint or proof shows these men have continued to be such trustees to this date.

That in the month of May, 1908, said Bell became the owner of said notes and mortgage and 1,250,000 shares of the stock of the Sunset Company, and conspiring with said Black to convert the assets of the corporation to their use, Bell on November, 1908, brought an action in the Superior Court, Snohomish County, Washington, (page 9), alleging that the corporation was insolvent and unable to pay its debts, that it owned mining claims of value and was without funds and could not borrow money to do the assessment work for the year 1908. That unless such work was done said claims would be forfeited and asked the appointment of a receiver to protect the property, and if necessary to sell such property. That the summons was served on McNutt, as president in New York State, and D. W. Locke, an attorney, appeared in the suit for the Sunset Company, but said Locke did not make a bona fide defense or investigate the merits of the case (page 10). There is no allegation that Locke was not authorized to appear or that there was fraud about his employment or that Bell as plaintiff in the action ever knew of the appearance.

That Locke did not have proper authority to appear; that he allowed a claim of said Bell for $10,000.00 and judgment for the notes and interest in sum of $37,501.75. That the corporation was adjudged insolvent, a receiver appointed and its property decreed to be sold to pay the judgment and debts, to none of which said Locke objected. That there was no proper service on the corporation and the proceedings were void. Further that they were part

of a collusive and fraudulent scheme of Black and Bell to get control of the assets of the company (page 11).

That the time the receivership proceedings were pending said Black was the presiding judge of the Court in which the action was brought, and he called in divers judges to hear the case to the end that such judges would not discover the collusive and fraudulent scheme of Black and Bell (pages 11, 12).

That said Bell filed with the receiver a judgment recovered in the District Federal Court of New York State against the Sunset Company for $12,767.57 which was void because said company had never complied with the laws of New York State permitting it to do business therein and service upon it in said state was void (pages 12, 13).

That Black filed with the receiver a claim for $10,923.21 which was illegal and exorbitant (page 13). That the total debts proved against the corporation amounted to $64,000.00 (page 13).

That after the receiver was ordered to sell D. Rudebeck, a minority stockholder, made a motion to postpone the sale, alleging that the claims presented to the receiver were invalid and money was owing the company which would pay its debts, and other matters which complainant alleges in his bill here, but the motion was denied (page 14).

That the property sold for $40,000.00 of which $2,000 was paid in cash and balance by cancellation of prior liens. That the value of the property exceeds $40,000.00 (page 16).

That since Bell acquired his stock he and Black have owned a majority of the outstanding stock and are in control of the corporation, and to convert its property have mismanaged the company, etc.

The original bill asked that the receivership proceedings in the State Court be set aside as void (page 17) but after the case had been pending for some time on motion of plaintiff this relief was stricken out (page 23) so the bill now stands as asking that the receiver's sale be set aside (page 18) and that it be decreed that Black and Bell hold title to the property as trustees for the corporation and its stockholders (page 18).

The plaintiff therefor appears here in the anomalous position of asserting that Black and Bell have no title and asking that a constructive trust be impressed on something that does not exist.

Service was not made in this action on the Sunset Company and it is not a party.

Upon the trial the plaintiff failed to prove a single collusive, fraudulent or wrongful act on the part of Black and Bell or any allegations of wrong alleged in his bill. On the contrary the defendants clearly established that there was no wrong, and that their whole conduct had been fair, honest and just. Upon the trial the plaintiff did not even deny that he was complaining about things which he had asked Black and Bell to do and that they had refused to be parties to his wrongful demands. The action was properly dismissed and the judgment should here be affirmed.

## POINTS.

### I.

**The Corporation appeared by Attorney in the action in the State Court: This conferred jurisdiction and the judgment there rendered cannot be attacked collaterally and Plaintiff's only remedy is by motion in that action.**

Under Rule 11 of this court no alleged error will be regarded, unless pointed out in the assignment of errors. Although plaintiff's bill makes mention of the above point we submit that the assignment of errors does not. The only reference to the State Court proceeding is in VIII of said assignments (page 192) which says the court erred in holding valid the proceedings wherein the assets of the corporation were sold by the receiver. No intimation is made that the State Court did not have jurisdiction of the action, or the parties or the subject matter. The term "proceeding" does not refer to the beginning of an action, but to a step in the action; properly considered it can refer only to the papers upon which the receiver asked for the sale and the order of sale. There is no averment in the bill that service was not made on the corporation in the State of Washington. Black was a trustee and general manager of the company (page 7) and he employed Locke to appear for the corporation (page 95). The order appointing the receiver recited "that due and legal notice" was given the corporation (page 125) and the decree recited the appearance of Lock, as attorney, (page 131).

We deem it unnecessary to cite authorities to the effect that these recitals are entitled to full credit, unless

the records shows that service was not so made. Both Black and Locke were witnesses for the complainant and neither were asked the question, and there is no proof in the case bearing thereon. As complainant is attacking the judgment the burden was upon him and as he made no attempt to make this proof the defendants were not called upon to prove the regularity of the proceedings. The presumption therefore is that service was made as above recited. Black did what any prudent man would have done and employed an attorney and removed all grounds for personal criticism.

We assume complainant's counsel will endeavor to make something of what he did show, and even this avails him nothing.

The summons and complaint was personally served on the president of the corporation in New York State November 30, 1908 (page 126). Personal "due and timely" service thereof was admitted by the defendant, through its president, and this rendered further service unnecessary (page 124).

32 Cyc 450.
Vermont Farm Machine Co. v Marble, 20 Fed. 117.
Allured v Voller, 107 Mich., 476.

Judge Black was the sole trustee of the corporation in Washington (page 99). Plaintiff's proof showed that he was the manager (page 95). Locke was employed to defend the case and carefully examined the merits and concluded there was no defense (page 95). He regularly appeared and recited his authority so to do (page 130) and entered into stipulations for hearings (pages 96;

130). He consented to the proceedings had before the judges and served formal appearance so he could look after necessary steps in the action (page 96). There was no fraud on the part of the plaintiff Bell in the employment of Locke, because he did not know of it until March 1909 (page 109) and Locke appeared months before (page 130).

> "The defendant *** when he voluntarily entered his appearance *** placed himself in the same predicament with the other parties regularly before the court. *** The decree, therefore, so far as this exception is designed to affect it, cannot be impeached."

Shields v Thomas et al, 59 U. S. (18 How.) 253, 259.

See Leach v Burr, 188 U. S. 510, 513.

The complaint does not question the appearance of Locke, as attorney for the corporation, and this being admitted the judgment cannot be collaterally attacked upon any ground, except by motion in the State Court and in the action there pending. This is true even where an attorney has no authority to appear or his appearance was procured by actual fund.

23 Cyc 1077.
Cen. Digest Vol. 30, sec. 930.
Landes v Brandt, 51 U. S. (10 How) 371 opinion.
Kent v L. S. S. C. R. & Co., 144 U. S. 75, 88.
Hilton v Jones, 159 U. S. 584, 589.
Graham v Spences, 14 Fed. 603.
Tarbell v Lee, 40 Fed. 40.
Fitzgerald Construction Co. v Fitzgerald, 137 U. S. 105, opinion.

In re Stillman 139 N. Y. 337, 341.
Washbon v Cope, 144 N. Y. 287, 294.
Mount City Co. v Castleman et al. 177 Fed. 510, 516.
Swift v McFarland, 215 Fed. 452, 456.
Gilchrist Co. v Erie S. Co. 215, Fed. 741, 743.
Bower v Stein, 177 Fed. 673, 677.
Nougue v Clapp, 101 U. S. 551, 554.
Graham v B. H. & E. R. R. Co., 118 U. S. 161, 177.
Marshall v Holmes, 141 U. S. 558, 600.
Hull v Burr, 234 U. S. 712, 718.

The rule is clearly stated by Justice Peckham in the Washburn case, 144 N. Y., at page 294, as follows:

> "We think the objection grounded upon the unauthorized appearance of her attorney and the non-service of any process upon her cannot prevail in this action. It has been settled by an unbroken line of decisions in this state, running many years back, that, unless under some peculiar and extraordinary circumstances, not existing in this case, the objection that a party was not served and an appearance by an attorney in a court of record for such party was unauthorized, and, hence, that the judgment was without jurisdiction, cannot be taken in a collateral proceeding or action, and that the party is confined to a motion in the original action in order to obtain relief."

This rule was early laid down as one governing practice in the Federal Courts where it was said in the Landes case, 51 U. S. ,page 371 (the parties claiming that the appearance of the attorney was unauthorized):

> "If it was voidable for want of notice and a false statement on its face 'that the parties appeared by their attorneys and dispensed with a jury and sub-

> mitted the facts to the court', then it should have been set aside by an audita querela or on petition and motion; such being the familiar practice in similar case. Moreover; this suit in ejectment is collateral to the judgment; and it cannot be impeached collaterally."

The case of Mound City, 177 Fed. had under consideration facts very similar to those in the present case. There the complainant had full notice of a partition case in the State Court and the question of legality of advancements and in the State Court the advances were not litigated and in commenting thereon at page 516 the Court, said:

> "Having failed to do so, that does not give the complainant any standing in an independent suit in equity to have such claim asserted. A judgment entered upon the merits is an absolute bar to a subsequent action. 'It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose.' If any matter competent in defense was 'not presented in the action the subsequent allegation of their existence is of no legal consequence.' "

The principle above announced has been carried through the decisions of the court down to the Hull case, 234 U. S. decided in June, 1914, where in commenting upon this practice at page 718 the court said:

> "The District Court, in sustaining the demurrer, held that since upon the face of the bankruptcy proceedings there was no want of jurisdiction over the parties or the subject matter and the decree was not void in form, which could not be collater-

> ally attacked and could be assailed only by a direct proceeding in a competent court.''

The cases cited by Judge Neterer (page 86) are conclusive upon the point. Attention is called to the Mitchell case 180 U. S., 471-480, which squarely holds that the determination in the State Court is binding upon the corporation and its privies so long as the judgment of the State Court remains unmodified.

In this connection it should be observed that there is no proof whatever in the case of want of authority in Locke to appear for the corporation in the action in the State Court and without such showing this court will presume that the State Court had jurisdiction of the parties and of the subject matter.

> In re Cuddy, 131 U. S. 280.
> In re Cooper, 143 U. S. 472, 506.
> Hilton v Jones, 159 U. S. 584, 589.

In the Fitzgerald Construction case, 137 U. S. at page 105 Fuller, C. J., says:—

> ''That the appearance by the defendant *** waived all question of the service of process.''

The rule that complainant should have applied to the State Court for relief is especially applicable to this case. The laws of Washington make express provision for the application and require that it shall be made within one year after the order or judgment was made (page 112). This Circuit Court of Appeals has settled the rule adversely to the appellant.

> Denton v Baker, 93 Fed. 96.
> Strand v Griffith, 144 Fed. 828, 830.

## II.

**The action in the State Court was for a receiver, and the proceedings thereon were regular and cannot be attacked in the present suit.**

Upon the trial complainant's counsel intimated that the action in the State Court was to foreclose a mortgage and a receiver therein was improper.

The plaintiff's bill is not upon this theory, and it does not charge that the state suit was a foreclosure action. The bill charges that the suit was filed alleging the insolvency of the corporation, that it owed over $40,000, and had no money, that it had mining claims which would be forfeited unless the assessment work was done and that a receiver be appointed to protect the property (page 10). We now submit that the gravamen of the complaint in the State Court was the insolvency of the corporation, its lack of funds and credit and helplessness to hold its property and the necessity of a receiver to protect the same (pages 115 to 118). The prayer of the complaint asked for a receiver and that he be empowered to borrow money to do the assessment work and protect the property and the interest of the creditors and stockholders (page 118). True it did ask for judgment foreclosing the mortgage, but if a foreclosure was not proper in a receivership action it did not destroy the character of the action or render voidable the proceedings takeu. Demanding the foreclosure in equity was simply asking too much and not the proper form of relief, and had no legal effect upon the facts stated.

Henningway v Poucher, 98 N. Y. 281.

Watkins v Watkins & T. L. Co., 11 App. Div. (N. Y.) 517.

The proceedings in the case show that no decree of foreclosure was asked or made (pages 123 to 149). That the notes in suit were presented to the receiver and not even given a priority under the mortgage (page 138). The plaintiff was entitled to any judgment consistant with the case made by the complaint.

> Rogers et al v N. Y. & T. L. Co., 134 N. Y. 197, 219.

There is nothing in the record before this court showing lack of authority in the State Court and in the absence of such showing the authority of the State Court is presumed. Reference to the Washington Statutes show that the court has the right to appoint a receiver in foreclosure when necessary to protect the property involved.

## III.

**It is settled law in this country that a corporation can sell its stock at less than par.**

As to plaintiff's claim that the corporation sold some of its unlawful issue of stock at 2 1-2 cents per share (page 6), the same does not seem to be now raised by the assignment of errors, but for fear it may be urged on other grounds we give it notice. The evidence shows this stock was sold at a time when the corporation had neither money or assets and it induced W. H. Baldwin to buy 200,000 shares at 2 1-2 cents a share or $5,000.00. They got all out of Baldwin they could and more than they could from any one else. It was then worth less than 2 1-2 cents, in fact there was no market for it at any price (page 100).

Ever since the case of Scoville v Thayer, 105 U. S. 143, it has been held that a corporation can sell its stock at less than par. It is perfectly legal as between the corporation and its shareholders, but not as against creditors. Camden v Stuart, 144 U. S. 104, 113. And if sold at the best price obtainable it is proper even though prohibited by statute. Grant v East & W. R. R. Co., 54 Fed. 575, opin., R. R. Co. v Thompson, 103 Ill. 187, See Northern Trust Co. v Col. Straw Paper Co., 75 Fed. 936; Kellerman v Maier etc. 48 Pac. 377; Old Dominion Copper Min. Co. v Lewisoln, 210 U. S. 206.

There certainly can be no question but what if the issue of the stock was void Baldwin is entitled to a return of his $5,000.00 and this the court cannot decree because the corporation has no funds and is insolvent and the plaintiff makes no offer to aid it.

## IV.

**The judgment obtained by Bell in Federal Court in New York was regular.**

Upon the trial it appeared that defendant Bell procured a judgment against the Sunset Company in the District Court of the United States in the State of New York upon a note made by the corporation in said state. Service was made on the corporation in the State of New York.

The grounds of complainant's objections were that the Sunset Company had not complied with Section 15 of the Stock Corporation Law of the state which provides that a foreign corporation shall not do business in New York without filing a copy of its charter with the Secre-

tary of State and procuring a license authorizing it to do business in said state and further "no foreign stock corporation doing business in this state shall maintain any action in this state upon any contract made by it in this state, unless prior to the making of such contract it shall have procured such certificate" (page 73).

It will be noted that the only penalty prescribed by the statutes is that a corporation cannot sue in New York State and the section has been construed many times by the courts of the State of New York and the holdings are squarely to the effect that the only effect of the omission to file copy of the charter and to obtain certificate authorizing the corporation to do business deprives it of the right to sue in the courts of the state and that a contract made by such corporation is perfectly valid within the state or elsewhere and can be enforced by the other party to the contract in the courts of said state and in the United States courts.

The V. Neuchatel Asphalte Co. v Mayor, etc., 155 N. Y. 373, 376.

Gaul v Kiel & Arthe Co., 199 N. Y. 472, 478.

Mahar v Harrington Park Villa Sites, 204 N. Y. 231.

Fritts v Palmer, 132 U. S. 282, 289.

David Lupton's Sons Co. v Auto Club of America, 225 U. S. 489, 495.

New York Breweries Co. v Johnson, 171 Fed. 582.

Richmond Cedar Works v Buckner, 181 N. Y. 424.

The cases are squarely upon the point and they are uniform in the holding. In fact, the New York courts

go so far as to hold (199 N. Y. 478) that where the corporation has failed to comply with the statute it cannot set up its failure in an action in the state court to defeat an action brought against it therein. This involves a well settled principle of law that a party cannot allege its own wrong as a defense to its own acts.

But the complainant urges that service on the corporation in New York State was not good because it was not doing business in that state. This is only one of the complainant's inconsistencies in this action. One of the grounds urged as wrong committed by the corporation is the fact that all of its books and records were kept in New York State and that its meetings were there held and its business there transacted (pages 5 and 6). The evidence shows that the directors of the company other than the defendant Black resided in New York and that the meetings of the company were held in that state and the minutes thereof sent on to Washington (pages 99, 100). To make any point of this matter at all the complainant is forced to repudiate the allegations of his bill and the proof he made on the trial but under the decisions of the court above cited there can be no point in the objection.

## V.

**This action was properly dismissed because the complainant's bill and proof did not excuse the requirements of equity Rule 94.**

There is no averment in the bill nor proof in the case that before bringing this action plaintiff applied to the corporation, its trustees or shareholders to bring the same, nor is there any averment or proof offered excusing

such application. That such averment and proof must be made has long been our settled law. It was settled in the Federal Court in Hawes v Oakland, 104 U. S. 450, and as a result thereof made a rule of this court, while in the State Courts it has become firmly established by a long and unbroken line of decisions. The bill and proof must show that an earnest effort was made to the directors and share holders to induce the corporation to act, or show facts excusing the same.

Hawes v Oakland, 104 U. S. 450, 460, etc.
Dimpfell v Ohio & M. R. Co., 110 U. S. 209, 211.
Quincy v Steele, 120 U. S. 241, 247, etc.
Taylor v Holmes, 127 U. S. 489.
Porter v Sabin, 149 U. S. 473, 478.
Whitney v Fairbanks, 54 Fed. 985.
Putnam v Ruch, 54 Fed. 216.
Kessler v Ensley Co., 123 Fed. 546.
Macon R. Co. v Shailer, 141 Fed. 585, 591.
Thomasson v Trust Co., 159 Fed. 126.
Poor et al v I. C. Ry. Co., 155 Fed. 230.
Clarke v Eastern B. & L. Assn. 89 Fed. 779, 781.
Graves v Gouge, 69 N. Y. 156.
Flynn v Brooklyn R. R. Co., 158 N. Y. 493, 508.
Kavanaugh v Trust Co., 181 N. Y. 121.
O'Connor v V. P. & P. Co., 184 N. Y. 52.

There are cases which hold that where the corporation refuses to act, the stockholder can by showing the corporation so disorganized that it cannot act; or that a majority of the directors have personal interests adverse to that of the corporation; or that the suit is to disapprove breach of trust on the part of the directors, and such are the cases cited by the appellant. These cases do

not hold that averments to the above effect are not to be made and proven, but on the contrary all the cases do hold that the facts must be particularly set out.

The averment and proof that application has been made and refused or that it would be unavailing are essential parts of the cause of action, and of course every cause of action must be proved.

> Greaves v Gonge, 69 N. Y. 154, 157.
> Flynn v Brooklyn R. R. Co., 158 N. Y. 493, 508.
> O'Connor v V. P. & P. Co., 184 N. Y. 52, 53.

There were five trustees of the corporation (page 8). The bill charges that Black, a trustee and manager of the corporation, with Bell, Baldwin and McNutt, wrongfully issued the notes without consideration. There is no intimation that any of the persons named were trustees, other than Black, and that Baldwin afterwards became a trustee (page 7). That Black and Bell held the majority of the stock of the corporation and intimated, that as such holders they controlled it (page 16). These are the only allegations bearing theron. The bill shows that Black, McNutt, Davis, Sellingham and Metzger were the last trustees named, and there is not even a suggestion in the bill that Black or Bell knew, controlled or dominated any of them, or that they were connected with or interested in the acts charged against Black and Bell. The charge of the bill is that Black and Bell were the sole actors and persons in interest and the purchasers at the sale (pages 9, 16).

Weak as is the bill the proof falls far short of it. The notes were all issued before the year 1905 (pages 7, 8). Bell never was a trustee but for a single day in 1904

(page 76) and this was to work out a change in trustees (page 109). Bell did act as counsel for the corporation for a time but severed his relations with it in April 1906 (page 109) and from that time on was not, and there is no proof to show that he had any connection with the company. He did not become owner of the notes until August, 1907 (page 108), or three years after they were made. There is no evidence to show that at the time the notes were made he knew about them nor that he had any interest or relations with the corporation or persons interested in it. The proof fails absolutely to connect Bell with any charges made in the bill.

The court in disposing of the case clearly sums this up and says:

> "Nor is there any evidence before the court to justify the conclusion that either the defendant Black or Bell has had any influence over the board of trustees or exercised any undue influence of any character in any of the proceedings referred to in the complaint." (Page 78).

In an examination of all of the authorities bearing upon the point under consideration we have been unable to find a single case holding that the facts here presented excuses demand on the corporation to bring the action, but on the contrary they do hold upon these facts that the demand must be made and the particulars alleged and proved.

In disposing of this point it must be kept in mind that Black is the only director charged with wrong and it is not charged by the bill or proof that either Black or Bell had any relations or influence or control over the other directors.

The case of Watson v U. S. Sugar Refinery, 68 Fed. 769 is directly in point in this case. There are four trustees, one of whom was charged with fraud, but the other three were not and the court dismissed the bill for failure to comply with Equity Rule 94, and at page 772 said:

> "The rule is well settled that a stockholder cannot maintain a suit for a wrong to the corporate body without showing either an effort to set the corporation in motion to redress the wrong, an application made to the Board of Directors to that end or that such efforts or applications would be useless, and this requirement is not satisfied by an allegation that the directors or a majority of them are acting in the interest or under the control of others who are charged with the fraud."

Other cases bearing directly on the proposition that the allegations must be made in addition to those above cited are:

> Detroit v Dean, 106 U. S. 537, 541.
> Vener v Gr. N. Ry., 209 U. S. 24.
> Foote v Cunard Min. Co., 17 Fed. 46.
> Edward v Trust Co., 124 Fed. 381.
> Securities Co. v Transit Co., 165 Fed. 945.
> Price v Land Co., 187 Fed. 886.

As was said in the Venner case, 209 U. S. at page 34:

> "The rule was adopted and the allegations made essential to the exercise by the court of its equity jurisdiction. It would seem that the rule needed no discussion under the circumstances because it requires explicitly that the bill set forth with particularly the efforts of the plaintiff to secure such action as he desires on the part of the managing directors or trustees and, if necessary, of the shareholders, and the causes of his failure to obtain such relief."

## VI.

**The action was properly dismissed because the corporation was not made a party defendant.**

The transcript shows that the corporation did not appear in the action and there was no proof of service upon it. In fact, no claim was made by the plaintiff that the corporation was ever served.

If there is a cause of action alleged in the complaint it belongs to the corporation itself. In other words, if the corporation could not maintain the action the same could not be maintained by a stockholder. This being the principle involved the courts have held uniformly that the corporation was a necessary party to the end that it should be bound by the judgment. We have been unable to find any case which departs from this rule and all the cases hold strictly to it.

Greaves v Gouge, 69 N. Y. 154, 156.

Flynn v Brooklyn City R. R. Co., 158 N. Y. 493, 508.

Porter v Sabin, 149 U. S. 473, 478.

Putnam v Ruch, 54 Fed. 216.

That the cause of action belongs to the corporation is also equally well settled.

Flynn v Brooklyn R. R. Co., 158 N. Y. 508.

O'Connor v Virginia P. & P. Co., 184 N. Y. 46, 53.

Porter v Sabin, 149 U. S. 473, 478.

Whitney v Fairbanks, 54 Fed. 985.

Clark v Eastern B. & L. Assn., 89 Fed. 779, 781.

The principle has recently been announced by the United States Supreme Court which holds that the suit is that of the corporation itself. Deckerman v Northern Trust Co., 176 U. S. 181, 188.

## VII.

**The action was properly dismissed because brought by the plaintiff individually.**

The rule is equally well settled that where the corporation refuses to bring the action for alleged fraudulent acts or wrongdoing of the directors a stockholder can sue only "in behalf of himself and all other stockholders similarly situated". It is usual to put this provision in the title but some cases have held that where there is an allegation to the effect that it is brought in behalf of plaintiff and other similarly situated, etc., this is sufficient but that it must be so brought is clearly held.

Kavanaugh v Trust Co., 181 N. Y. 121, 124.
Dodge v Woolsey, 59 U. S. 331.
Smith v Poor, 22 Fed. cases No. 13093.
Carson v Glasgow, 189 Fed. 791.
Davis v Peabody, 170 Mass. 397, 400.

After citing the cases bearing thereon Chief Justice Cullen in the Cavanaugh case, 181 N. Y., 124 says:

> " 'The right of action, however, belongs to the corporation and should be brought by it as plaintiff, but when it will not bring the suit itself, an aggrieved stockholder, after due demand and refusal or unreasonable neglect to proceed, may bring it in his own name on making the corporation a party defendant'. The action must be brought not only on behalf of the plaintiff, but

> also on behalf of all other stockholders of the company, and that is the form of the action before us."

In the Davis case, 170 Mass. at page 400 that court says:

> "All the shareholders have an interest in that branch of the bill which alleges maladministration of the trust property. *** To obtain such relief the plaintiff must either sue for the benefit of all having like interest to himself so that they may come in and share in the conduct of the suit, or make them defendants". (Citing Snow v Wheeler, 113 Mass., 179; Tyrrell v Washburn, 6 Allen, 466.)

Where the suit is brought by a single stockholder and other stockholders do not intervene this court will assume that the other stockholders are satisfied on the matters complained of. Carson v Allaging W. G. Co., 189 Fed. 791.

## VIII.

**Plaintiff failed in this case to show that he was injured by the sale and this was cause for dismissing the action.**

The bill alleges that Black and Bell paid $40,000 for the mining claims, but they were worth much more (page 16). This is denied by Black's answer (page 35) and by Bell's (page 57). There is no evidence in the record to show that the property was worth a single dollar. Plaintiff's own proof shows that the state court had adjudged the corporation insolvent (page 132). The claims proved before the receiver amounting to over $64,000.00 (page 145). Upon the trial plaintiff showed that as early as 1903 the corporation was without money or

assets (page 100). He also showed that the corporation received money for the face of the notes and that to August 1904 there was spent in development work and machinery $30,000 for which the notes were given (page 2). In disposing of the case the court said there was no evidence before it of the value of the property as mineral land (page 79).

Upon this showing it is clear that the allegations of the complaint to the effect that the notes were given without consideration were untrue and as the evidence stands all of the debts and claims presented to the receiver in the State Court action were valid claims and if the sale should be set aside or the plaintiff had appeared in the action and resisted the proceedings it would not have benefited him because the company was insolvent and unable to pay its debts and there was consequently nothing for the stockholders. These facts bring this plaintiff's case clearly within the principles laid down in Darragh v H. Wetter Mfg. Co., 78 Fed. 7, 16.

Hill v Phelps, et al. 101 Fed. 650, 653.
A. T. & S. F. Ry. v Sullivan, 173 Fed. 456, 476.
Peoples U. S. Bank v Gibson, 161 Fed. 286, 292.

The Darragh case is so clearly in point on the principle that we quote the following:

> "Does the bill of the appellant state facts sufficient to entitle him to a vacation of the decree for the sale of the property of the Dickinson Hardware Company, for the discharge of the receiver, and for the ultimate return of its property to the corporation? *** He is a stockholder. Conceding that the acts of the president and directors of the corporation were intended to and did wreck the

> business of the company. *** It is not alleged that he incurred any personal liability by his ownership of his stock. Was his stock in any way depreciated in value by the acts of the appellees? *** There is no allegation in this bill that the stock of the appellant was of any value when the order appointing the receiver was made and *** we have been forced to the conclusion that it could not have been. *** For this reason we think this bill cannot be maintained. The appellant who seeks relief here shows his stock was worthless when the acts complained of were committed, so that he could not have been injured by them. He shows that no relief that the court below could have given could possibly have made it of any value. Courts of equity cannot attempt to right wrongs at the suit of those who have not suffered from them, or grant decrees that can give their suitors no relief."

The courts say of this that equity will not right wrongs at the suit of those who have not suffered by them. Resulting legal injury is as essential to equity as casual wrong (173 Fed. 467; 161 Fed. 294).

Foster v Mansfield C. & L. M. R. Co. 146 U. S., 88 was an action brought to vacate a decree in foreclosure and the plaintiff failed to show that the property involved was worth more than what it sold for on the former sale or that on a re-sale there would be anything to come therefrom to the plaintiff who was an unsecured creditor, the facts being somewhat similar to those under consideration, and the court said, page 101:

> "A court of equity is not called upon to do a vain thing. It will not entertain a bill simply to vindicate an abstract principle of justice to compel the defendants to buy their peace, and if it appears that the parties really in interest are content that the decree shall stand, it should not be

set aside at the suit of one who could not possibly obtain a benefit from such action.''

In other words, equity will not do a vain thing.

## IX.

**Plaintiff failed in establishing any charges of collusion or fraud.**

The plaintiff's bill is founded on these charges against Black and Bell. In disposing of the case the Court said there was no such evidence (page 78). Black threatened to defend any suit Bell brought to enforce the notes and said he would make it expensive for Bell (page 102). Bell knew nothing about the proceedings in the State Court and relied upon his attorney (page 109). Black and Bell never agreed on anything until the day of the sale when they finally came together and agreed that they would bid $40,000 for the property and if anyone bid more they would let it go (page 1103. This did not show any collusion or fraud or desire on their part to get hold of the property. The only thing that can be spelled out of this was a purpose on Bell's part to protect his debt.

Collusion is an agreement between two or more persons to defraud a person of his rights by the forms of law, or, to obtain an object forbidden by law. Dickerman v Northern Trust Co. 176 U. S. 190; Wallace v Jones, 122 N. Y. App. Div. 497. It is a concert of action based on some agreement.

This case is free of anything of this kind and the evidence does not even furnish an excuse for a discussion

of the question. There was no wrong in Bell enforcing his claim as we shall see by the next point.

## X.

**Bell's motives in enforcing his claims are immaterial and will not be inquired into by any court.**

Upon the trial plaintiff disproved the charges of his bill that the Baldwin notes, in suit in the State Court, were given without consideration. He showed that the company received the full face of the notes and that the same was spent for corporate purposes (page 102). The action was not commenced until 1908 (page 122) and the notes were all due in the year 1904 (pages 123, 124).

Wrongful motives or collusion in the enforcement of any claim is not a defense, and payment of the debt can only arrest the action.

Morris v Tuthill, 72 N. Y. 575.

Swift v Finnigan, 53 N. Y. App. Div. 74.

Weis v Levy, 106 N. Y. App. Div. 500.

North C. R. Co. v Blackman, 145 N. Y. App. Div. 199.

Dickerman v Northern Trust Co., 176 U. S. 181, 190.

The Morris case is the leading one on this proposition,and has been followed and adopted as the law of all the states and of the United States.

In the Dickerman case (176 U. S.) in speaking of the principle the court, at page 190 says:—

> "If the law concerned itself with the motives of parties new complications would be introduced into suits which might seriously obscure their real merits. If a debt secured by a mortgage be justly due, it is no defense to a foreclosure that the mortgagee was animated by hostility or other bad motives."

Courts will never stop to inquire into the motives actuating a person in the enforcement of a legal right.

> Clinton v Myers, 46 N. Y. 511, 521.
> Phelps v Nowlen, 72 N. Y. 93, 45.
> Lough v Outerbridge 143, N. Y. 282 opinion.
> Cainfield v U. S. 167 U. S. 523 opinion.

## XI.

**The judgment and sale in the state court is res adjudicata, and cannot be questioned collaterally by a party or privy.**

The United States Supreme Court has definitely settled this principle, and in the following language:—

> "The general principle announced in numerous cases is that a right, question of fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and even if the second suit is for a different cause of action, the right question of fact once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified. This general rule is demanded by the very object for which civil courts have been established, which is to secure the peace and repose of society by the settlement of matters capable of judicial determina-

> tion. Its enforcement is essential to the maintenance of social order; for, the aid of judicial tribunals would not be invoked for the vindication of rights of persons and property, if, as between parties and their privies, conclusiveness did not attend the judgment of such tribunals in respect of all matters properly put in issue and actually determined by them."

Southern Pacific R. R. Co. v U. S., 168, 1, 48, 49.
Mitchell v First Nat. Bank, 180 U. S., 471, 480.

The same rule applies in equity actions, and the remedy is by appeal or motion in the original action.

Bryan v Kennett, 113 U. S. 179, 197.
United States v Throckmorton, 98 U. S. 61.

This is true even though the trial court erred in the facts or law, and applies to an order of sale.

Hine v Morse, 218 U. S. 493, 505 to 509.
Fauntleroy v Lum, 210 U. S., 230, 237.

The cases hold that even though the judgment is against the facts, or without facts to sustain it, the rule still holds good. Other cases to the same effect are:

Gunn v Plant, 94 U. S. 664, 669.
Millen v Maline Iron Works, 131 U. S. 352, 367.
Kent v L. S. L. Co., 144 U. S. 75, 88.
Insley v United States, 150 U. S. 512, 515.
Reinach v A. G. W. R. Co., 58 Fed. 33.
Mound City Co. v Castleton, 177 Fed. 510.
Stokes v Foote, 172 N. Y. 334.
Re Jenkins, 132 N. Y. App. Div. 339, 343.
Blake v J. V. L. & F. M. Co., 77 N. Y. 626.

Reed v Weed, 107 N. Y. 445.
Thomson v Wooster, 114 U. S. 111 opin.

The same rule applies to a receiver's sale.

McEwan v Harriman Land Co., 138 Fed. 797.

If the defense might have been considered, if they were such as might have been given by a court of law, they were determined by the judgment regardless of whether or not they were interposed by the defendants or considered by the court.

Intermela v Perkins, 213 Fed. 106, 108.
Re Jenkins, 132 N. Y. App. Div. 339.
Stokes v Foote, 172 N. Y. 327, 344.

A stockholders of a corporation against which a judgment has been taken is a privy in law and cannot attack the judgment collaterally.

Graham v Boston H. & E. R. Co., 14 Fed. 753, 760.
National F. & P. Works v Oneonta W. Co., 68 Fed. 1006-7.
Affirmed, 183 U. S. 216.
Sanger v Upton, 91 U. S. 56, 59.
Nougue v Clapp, 101 U. S. 551.
Graham v Boston H. & F. R. R. Co., 118 U. S. 161, 177.
Hawkins v Green, 131 U S., 319, 329.
Green v Leggett, 135 U. S. 533, 544.
Mason v Peck, 103 Me. 430.
Ross v Dewey, 215 Pa. 526.
Black on Judgments, 2nd Ed. Sec. 549.

The language of the courts is too clear to admit of doubt:—

> "The stockholder is bound by a decree of a court of equity against the corporation, *** although not a party as an individual, but only through representation by the company. A stockholder is so far an integral part of the corporation that, in view of the law, he is privy to the proceedings touching the body of which he is a member." (135 U. S. 544).

It is difficult to discuss the appellant's contention on this point because there is nothing in the record to take this case out of the principles laid down by the cases. We cannot point to any collusion or fraud, because none was shown. The notes in the state suit were just debts of the corporation because it had the money on them (page 102). The notes were all due in the year 1910 (page 7) and Bell was obliged to enforce the collection of them or they would outlaw. Bell was not a trustee, and severed his connection as attorney for the company in 1906 (page 109). As before pointed out Bell cannot be charged with wrong in seeking to enforce his just legal claims, although Black did try to resist the enforcement of them (pages 102, 108). The corporation regularly appeared in the State Court (page 130) and thereafter the court made a judgment adjudging the corporation insolvent and directed its property to be sold to pay its debts (page 132), on the appearance of Locke, the company's attorney (page 96). The claims against the company were properly proven and amounted to over $64,000.00, and that the receiver had in addition borrowed $3,200.00 (page 145). Under an order of the court the sale was made March 20, 1909 (page 155).

Rudebeck, a minority stockholder, objected to the confirmation of the sale (page 158) as did one Reid (page 159) alleging mismanagement and fraud (page 160) and that Black and Bell were trustees and had assisted in putting the corporation in its then condition (page 162). In fact the objections raised all the questions set up in the bill in this action. Locke, attorney for the corporation, and Root and Duryee, attorneys for the objectors, were heard by the Court, but the sale was confirmed (page 165). Buchler knew all about the objections made by Rudebeck and Reid and had correspondence with them bearing thereon (page 105). Holmes, an attorney at Everett, wrote Buchler all about the suit, and he was in correspondence with Duryee about the objections (page 105). March 27, 1909, Buchler concluded to abandon relief in the State Court and take the matter to the Federal Court (page 105). He is now in no position to urge ignorance of what took place and if the cases bearing thereon are controlling he misconceived his remedy.

Buchler is not only concluded by the judgment against the corporation, but also by the objections of the stockholders. Where one stockholder brings a proceeding in Court for himself and others the decision thereon is binding on all other stockholders.

> Willoughby v Chicago etc., 25 Atl. 277.
> Hearst v Putnam, 77 Pac. 753.

The opinion of Judge Neterer correctly and ably disposed of this question (page 85, etc.)

## XII.

**A trustee may, at a public sale, bid in the corporate property.**

This question cannot affect the purchase of Bell because he was not a trustee, neither was he its counsel for this relation he severed in 1906 (page 109), and he did not become owner of the notes untl 1907 (page 108).

Under the circumstances it does not apply to Black. He did not procure the action to be begun on the notes and even made the trip from Everett, Washington, to New York City to induce Bell to withhold enforcing the notes, and threatened Bell that if action was commenced he, Black, would fight it to the end, but said if Bell gave the company a reasonable time in which to raise money he, Black, would not make Bell unreasonable expense (page 102). There certainly was no fraud or wrong in this, much less any collusion. Black failed in his efforts and the plaintiff refused to contribute (page 109). Black had been advancing money to the corporation, it owed him $10,000, part in judgment, part secured by a mortgage and part for salary and the assets of the company did not equal its debts (page 101), and there is nothing in the record here to show that the assets were worth a single dollar. Buchler was asked to put up his share of money, on basis of his stock holding, and he said he would not put up a dollar (page 109).

Under these circumstances Black was legally entitled to bid, and for his personal protection it was his duty so to do.

> "The principle that a trustee may purchase the trust property at a judicial sale brought about by

a third party *** is upheld by numerous decisions of this court and of other courts of this country."

Allen v Gillette, 127 U. S. 596 opinion.

The leading case upon this question in this country is that of Twin-Lick Oil Co. v Marburg, 91 U. S. 587. There the property was oil wells of doubtful value, here mining claims not shown of any value. In that case the trustee had loaned it money and bid in the property at a judicial sale. The facts in each case are practically the same even to asking the complaining stockholder to contribute, and the court held the sale valid.

Another case involving about the same facts as we have here is Marks v Merril Paper Mfg. Co., 188 Fed. 850, and the right of the trustee to buy was upheld.

Being a creditor Black had the undoubted right to buy.

Kent v L. S. C. Co., 144 U. S. 88 opinion.

Upon such facts as we have in this case the courts have always held that a trustee could buy.

Hapending v Munson, 91 N. Y. 650.

Duncomb v N. Y. N. H. & H. R. H. R. 84 N. Y. 190-208.

Leavenworth County v C. R. I. & P. R. R. Co., 134 U. S. 688, 707, 9.

Ryan v Williams, 106 Fed. 172.

Burnes v Burnes, 137 Fed. 781.

Wheeler v Abilene etc., 159 Fed. 391.

Cowell v McMillen, 177 Fed. 25.

Marks v Merill Paper Mfg. Co., 203 Fed. 16, 19, 20.

Saltmarsh v Spaulding, 17 N. E. 316.
Jenney v Minnesota, 82 N. W. 984.
New Memphis Gas Light cases, 60 S. W. 206.

The contention of the plaintiff is that a purchase by a trustee is void, and herein is where he errs. It is not void; but if the trustee secretly or fraudulently deals with the corporate property or profits in his transactions with it or acts as both seller and buyer and in either case promotes or consumates the acts he may be called upon to show the fairness and good faith of his dealings and if in these he fails the transactions are voidable at the election of the corporation. The present case does not fall within the rule because Black did not invite the action in the State Court, but resisted it to the best of his ability. He did not do the selling, and at the time of the sale he had no relations with the corporate property. The corporation and its property was in the hands of the court and the trustees could not act and the sale was made by the court through its officer, the receiver, a distinction clearly pointed out in Twin-Lick Oil Co., 91 U. S. 590 opinion.

It was proper for Black to loan money to the corporation and take security, and to hold or buy the property on his debt and this took him out of the rule (Duncomb case ,84 N. Y. 199 op.) It is now firmly established that a trustee may loan money to the corporation and is a settled and universal practice. It is the history of every corporation that it comes to financial want and certainly none are more interested in it, and its success, than its trustees. If the trustees could not aid ~~it~~ them with funds in time of need most of our corporations would not now exist. If the trustees could not thus loan money it would

be a great hardship on the creditors, trustees and shareholders. This is illustrated in the present case: There were no bidders but Black and Bell and but for them the property would have gone for a nominal amount. There would have been a deficiency of $50,000 or $60,000 in which event this complainant instead of bringing this action would be defending a suit requiring him to pay up the amount unpaid on his 58,000 shares of stock.

The cases are very clear upon this question and we ask only a consideration of them. In disposing of the question we ask this court to consider with it our next point.

## XIII.

**The action was properly dismissed for laches and want of equity.**

In this case these two questions are so closely related that time will be saved by discussing them together, and they require a brief review of the facts and the conduct of Buchler as disclosed by the record. They are as follows:—

> The Sunset Company was originally organized with a capital stock of 2,000,000 shares of $1.00 each and this was all issued before the year 1903. With this stock all outstanding the company in the year 1903 had neither money or assets (page 100). Buchler became the owner of his 58,000 shares previous to April 1st, 1899 (page 103). There is nothing in the record to show that the company, up to this time, ever did any work or expended any money on mining claims or that it even held or claimed any such claims, and the conclusion is irresistible that the original issue of stock was given away or at least practically so. No charge

of mismanagement is made up to the year 1903, and if money was paid for the stock what became of it, when the company had nothing to show for it? About this time the company's trustees came in contact with W. H. Baldwin, and they having neither funds nor property induced Baldwin to take 200,000 shares of stock of an increased issue at 2 1-2 cents per share and he paid to the company $5,000 therefor. They made the hardest possible bargain with Baldwin, getting out of him all they could, and the stock was not worth anything (page 100). The increased stock was not subscribed but was issued for a group of mining claims, and the stock turned back as treasury stock (pages 100, 101). Baldwin had nothing to do with this increased stock, except to buy it. It was not shown that he was even a stockholder or trustee and he never took any more of this increased stock. In November 1903 the company began to do something, and up to September 1904, borrowed of Ellen C. Baldwin about $30,000 (pages 7, 8, 102). This money was used in putting in machinery and developing the property (page 102). This it seems exhausted the Baldwins for after 1904 nothing was done but the assessment work of $3,600.00 annually (page 102). With the exception of one year this $3,600 was furnished by Mrs. Baldwin up to 1908, and the last money she loaned the company she secured by a mortgage on her little home (not in the record, but was in evidence).

W. H. Baldwin died prior to 1908 (pages 8, 9), the fact being he died in 1905 or 1906. Ellen C. Baldwin then became the owner of 1,250,000 shares of stock and her notes (pages 9) and these with the mortgage were assigned to Bell in 1907 (page 102).

From March 1899 to 1907, nothing is heard of Buchler in these matters. In the latter year he employed an attorney to set aside the increase of stock made in the year 1903, and the record is silent as to whether an action

was commenced and, if so, the results thereof (page 104). In 1908 he went to Everett, Washington, and took from Black an unexpired option on the Baldwin stock, notes and mortgage (page 104), but did not purchase under the option. It is evident that he did not begin an action, but concluded that it was more to his interest to take an option on the stock he says was void and the notes and mortgages he alleges were given without consideration, and with the intent and for the purpose of selling all at an advance and to the end that he might profit therefrom. His willingness to participate in anything is evident when he felt he could turn it to his personal advantage.

Buchler did not meet with success in selling his option so he went back to Black and labored with him to induce Bell to foreclose the mortgage, bid in the property and then let him, Buchler, sell it (page 106). Black refused and in the summer of 1908 Buchler came on to New York and saw Bell; he asked Bell to foreclose the mortgage and let him handle the property after the foreclosure, saying that he could sell it as a whole, but could not sell a controlling interest. Bell declined and asked him to put up his part of necessary money to do the assessment work and protect the property, and he said he would not put up a dollar and that the other stockholders would not put up anything. Bell then told him that unless the other stockholders did their part he, Bell, would enforce his claims and would not assume the duty of others (page 109). Buchler was in court and heard this testimony and did not even attempt to deny it, and it stands admitted.

It is clear that Buchler's trip to Washington and his visit to New York was prompted solely by his desire to make money. He did not care for the corporation or its

stockholders but was ready and anxious to enter into any plan that would enure to his advantage. His motive was to get something for nothing and he had no scruples about the methods pursued if the end which he sought was accomplished. It would be hard to conceive of more unscrupulous and dishonest motives than those, disclosed by this record, which actuated Buchler in his conduct.

On November 16, 1908, Bell sent a circular letter to all the stockholders (pages 108, 109) giving the condition of the company. He sent a lot of these letters to Buchler and asked him to send them to stockholders in Philadelphia (page 109). He advised the stockholders it was necessary to do the assessment work and patent the claims and for these purposes the company must have $13,600 and if the stockholders would advance their part, based on their holdings of stock, Bell and Black would do their part and let their claims rest and join the other stockholders in trying to do something with the property. He also advised them that if they did not do their part it meant a receivership and sale of the property (pages 152 to 154). Buchler received these letters and had other letters about them (page 105) but refused to put up a cent. Bell received only about $60.00 from other stockholders and this he returned (page 109). From this it is clear that in the year 1908, Buchler and the other stockholders had lost interest in the property and not only did not care to but declined to contribute to its protection.

Next Bell began action in the Superior Court of Washington for a receiver and the enforcement of his claims and the corporation regularly appeared in the action by an attorney (page 130). Buchler knew of the notes and mortgage in 1907; he knew of the action in the State Court before the sale and also knew about the judg-

ment Bell secured in New York; and before the sale he knew the property was to be sold to pay its debts (page 104). From February 1908 until after the sale he was in constant correspondence with Holmes (page 105) who was his partner in taking the option from Black (page 104). He was in correspondence with Rudebeck, a minority stockholder, who was trying to stop the sale and with Duryee, an attorney for minority stockholders, who were objecting to the confirmation of the sale, and March 27, 1908, he wired Duryee that he was in favor of taking the matter to the Federal Court. In 1908 he looked into all the company's affairs and even got a copy of the mortgage (page 105).

The corporate property was sold by the receiver to Black and Bell March 20, 1909, for $40,000, and after the sale Black and Bell held a meeting with the other stockholders and offered to let them come in and share in the bid on the basis of $40,000, Bell offering to throw out his judgment recovered in New York and to lose his services. Bell offered to do this upon the trial (page 110) and Buchler would not even accept this offer. The notes with interest at the time of the sale amounted to $37,500 (page 138) and the receivers certificate, held by Black and Bell, $3,200 (page 145) or more than the bid. The total debts and receivers certificates amounted to $67,-201.97 (page 145) so that the offer of Black and Bell to the stockholders was the wiping out of indebtedness of over $27,000.00. Was there here any evidence of a desire on the part of Black and Bell to convert the assets of the company to their own use? The statement of the facts is the best answer. Bell and Black had their money or their time and services in the greater part of this $27,000 and we submit that their conduct not only shows an ab-

sence of any wrong, but on the contrary, evidence the fairest and most equitable and liberal treatment and consideration of all. These offers make it clear that Buchler is not here acting in good faith, because the offer was and is without limit and he could have taken all or any part of it, and for the $40,000 wiped out about 2,500,000 shares of stock and over $67,000 in debts and owned all the property. It is over evident that Buchler wants no share in the property and while here professing good faith his one object is, if possible, to force Black and Bell to "buy their peace."

At the time of the sale Buchler knew that no application for patents had been made. He knew that it required an annual expenditure of $3,600 to hold the claims, and had been advised that it would cost $10,000 to secure the patents (page 152). He knew that Black and Bell were doing the assessment work and had applied for patents for his bill alleges the latter (page 16). He made no offer of assistance in these matters and knowing what Black and Bell were doing and, without objection, let Bell put up $12,145.00 (page 110) and Black put up a like amount (pages 102, 103). In fact from the year 1907 down to the time of the trial Black and Bell put up the money for annual assessment work and caring for the property and surveying and patenting the claims (page 102). They thus put up about $25,000 (page 79) and with interest this now amounts to over $30,000. To this day the patents have not been granted but the government has rejected a portion of them (page 111).

Buchler even now does not offer to pay any part of these expenses nor any part of the company's just debts. His conduct and delay in acting is easily accounted for.

He declined to give the company aid when it was asked, and said he would not contribute a dollar. He was advised of every act as it took place, yet he stood quietly by and did not murmur a protest, and what was his motive? In 1908 he procured a copy of the mortgage (page 105) and knew of the notes, even taking an option upon them (page 104). He set up the notes in his bill and knew that they outlawed in 1910, and that if he could wait and begin an action in 1912 and vacate the judgment in the State Court he would beat Bell out of over $37,000, the principal of which the company received and had expended on its property. He knew the corporate property was of doubtful value, and even upon the trial in this action did not attempt to show that it had any value, and failing in this it is fair to assume that it had no value. His bill alleged that it was worth over $40,000 (page 16), but this was denied by the answer of Black (page 35) and Bell (page 57) and the question of value was in issue. The Court says there was no evidence of the value of the property as mineral land (page 79). He further knew that there was no certainty of obtaining patents from the government and if Black and Bell failed on their applications they would lose their money and this may turn out to be the case. It is therefore apparent that the whole purpose of Buchler's delay was to let Black and Bell take all of the chances, and if they lost he would not suffer. It was not, and is not now, his purpose to risk a single dollar but that Black and Bell shall stand all risk and if their venture fails it shall be their loss, but if it turns out well that they shall be deprived of it absolutely and that he shall reap the full benefit of their efforts and expenditures. Where is the honesty of purpose in this and where is the complainant's fairness and equity? We submit that he has none of either. Not only this but his

selfish and mercenary purpose is shown by bringing this action individually in an endeavor to reap the whole benefit, leaving out the corporation and other stockholders, and not even pretending to sue "for himself and other stockholders similarly situated."

The complainant now urges that the trial court erred in holding the receiver's sale valid (Assn. IX, page 193). The sale by the receiver was March 20, 1909 (page 155), and this action was begun March 27, 1912 (page 21) or over three years after the sale.

This action is for fraud and under the laws of the State of Washington outlaws in three years. Plaintiff makes no claim that he was ignorant of the acts complained of so the statute began to run from date the sale was made. The superior court of that state can vacate a judgment obtained by fraud practiced by the successful party, but the application therefor must be made within one year after the judgment or order was made and upon petition or by affidavits (see pages 111, 112). The judgment in the State Court was made and entered January 30, 1909, (page 133) and the order of sale February 15, 1909 (page 147) so that complainant's remedy had been outlawed for over two years when the present action was commenced.

The Federal Court has settled that,

> "In case of a constructive trust, lapse of time is as complete a bar in suits of equity as in actions of law, and in determining bar from lapse of time courts apply the statutes of limitation. This does not apply to express trusts."
>
> Merrill v Town of Monticello, 66 Fed. 165.
> Missouri S. & L. Co. v Rice, 84 Fed. 131.
> Cooper v Hill, 94 Fed. 582.

In Washington an action based on fraud outlaws in two years,

Wagner v Law, 3 Wash. 88

and actions against stockholders in two years.

Aldrich v Skinner, 98 Fed. 375
Aldrich v McClam, 98 Fed. 378.

> "Whatever may once have been the rule, it is now well settled that the statute of limitations run in favor of a defendant charged as trustee of an implied trust."

Hecht v Staney, 14 Pac. 88.

Equity requires diligence on the part of a complaining stockholder, and when he remains inactive and permits others to expend money in improving property equity will not aid him.

Roberts v Northern Pacific R. R., 158 U. S. 1, 11.
Penn. Mutual L. Ins. Co. v Austin, 168 U. S. 685, 698.

This rule has in particular been applied to mining properties. In speaking of this class of property, Justice Miller in Twin-Lick Oil Company case (91 U. S., 592) says:—

> "Property worth thousands today is worth nothing tomorrow; and that which would today sell for a thousand dollars as its fair value, may, by the natural changes of a week or the energy and courage of desperate enterprise, in the same time be made to yield that much every day. The injustice, therefore, is obvious, of permitting one holding the right to assert an ownership in such property to voluntarily wait the event ,and then de-

> cide, when the danger which is over has been at the risk of another, to come in and share the profit."

In another mining case, Johnson v Standard Mining Co., 148 U. S. 360, at page 371 Justice Brown says:—

> "Under such circumstances, where property has been developed by the courage and energy and at the expense of the defendants courts will look with disfavor upon the claims of those who have lain idle while awaiting the results of this development."

Where the stockholder awaits the outcome of the venture the rule is not changed because the trustee is a purchaser.

> Haywood v National Bank, 96 U. S. 611.
> Hoyt v Latham, 143 U. S. 553, 567.
> Felix v Patrick, 145 U. S. 317.
> Hammond v Hopkins, 143 U. S. 224, 334.

And under these circumstances a sale will not be set aside at the suit of a single stockholder.

> Foster v M. C. & R. R. 146 U. S. 88, 99.

Where the complaining party is ignorant of the facts or they have been suppressed from him by the alleged wrongdoer or the facts are such as not to put him on inquiry, then the court, in furtherance of justice, will not apply the running of limitation statutes until such time as he had notice or by the exercise of reasonable diligence he should have had constructive notice. We concede this rule without the citation of cases but this complainant does not fall within the rule because he alleges no ignor-

ance and upon the trial testified that he knew of every act and all the facts as they occurred.

On the other hand where the complaining party knew the facts the courts uniformly deny relief in a shorter time than that prescribed by the limitation statutes.

Whitney v Fox, 166 U. S. 637.

Equity does "not sit to restore opportunities or renew possibilities which have been permitted to pass by the neglect, the ignorance, or even the want of means of those to whom they were once presented."

Leavenworth County v C. R. I. & P. R. R., 134 U. S. 709 opinion.

This Circuit has disposed of the question under consideration, Denton v Baker, 93 Fed. 96, Judge Ross saying:—

> "But such relief is never given upon any ground of which the complainant, with proper care and diligence, could have availed himself in the proceeding at law. *** If he be not within this category, the power invoked will refuse to interfere, and will leave the parties where it finds them. Laches, as well as positive fraud, is a bar to such relief."

In the above case complainant alleged the procuring of a fraudulent judgment against a bank in Washington. He did not apply to the State Court and after two years sued in the Federal Court. The action was dismissed for laches.

Again Strand v Griffith, 144 Fed. 828, 830 (in this Circuit) Judge Gilbert, says:—

> "The bill presents the question whether a Circuit Court *** can revise or set aside a final decree rendered by a State Court *** upon the ground of fraud, when the injured party has had an opportunity to apply to the State Court to revise the decree. This question has been determined adversely to the appellant by the Supreme Court". (Citing cases).

In this case plaintiff delayed for seventeen months in bringing action, and the court held he was guilty of laches, and farther that no excuse relieved the party from applying to the State Court.

Rothchild v Memphis R. R., 113 Fed. 476.

This was sale of corporate property purchased by trustee who expended money in the improvement of the property. A minority stockholder waited seventeen months and then brought suit, and the Court held his action too late. The Supreme Court refused to review the decision. 188 U. S. 740.

The Supreme Court has held that a delay of six months is unreasonable, the party having knowledge of the facts.

> Indianapolis R. M. v St. L. F. S. & W. R. R., 120 U. S. 256.

If the complaining party knows the facts the court will hold him guilty of laches before the expiration of the statute of limitations.

> Alsop v Riker, 155 U. S. 448, 460.
> P. & L. A. I. Co. v C. I. M. Co., 178 U. S. 270.

> "The fact that the venture proved successful after large expenditure creates no equity for this complainant. The skill, energy and money of that company developed a valuable property. It ought in justice to reap the benefit, and the complainant ought to be estopped to participate in the benefit, unless an unbending rule of law prevents" (citing cases).
>
> P. & L. A. I. Co. v C. I. M. Co., 178 U. S., 270, 278.

## NO EQUITIES WITH COMPLAINANT.

The plaintiff has shown no fraud or wrong in Black and Bell. If we even concede his claim, which we deny, he has not offered to restore Black and Bell to their former position or to contribute to the protecting and securing of the property. For him to thus gain advantage would, in equity, be a gross injustice. In speaking of the rule the court has well said (Duncomb v N. Y. H. & N. R. R. Co., 84 N. Y. 199):

> "The rule was adopted to secure justice, not to work injustice; to prevent a wrong, not to substitute one wrong for another *** Thus, the benficiary may avoid the act of the trustee, but cannot do so without restoring what it has received. To cling to the fruits of the trustees dealings while seeking to avoid his acts; to take the benefit of his loan, and yet avoid and reverse its security, would be grossly inequitable and unjust. It would turn a rule designed as a protection, into a weapon of offense and injustice."

Even where the action is to impress a constructive trust on property secured by a director through fraud offer and payment of the debt is essential to maintenance of the action.

Harpending v Munson, 91 N. Y. 650.

Even where fraud is shown equity requires that the corporation pay that which it has had the benefit of. "Any other terms would be unjust, and would make the court the instrument of this injustice."

Thomas v B. & B. R. Co., 109 U. S. 522, 526.
Porter v P. B. S. Co., 120 U. S. 649, 672.

Other cases directly in point are:—

Wheeler v Abilene N B. Co, 159 Fed. 391, 395.
Marks v Merrill P. Mfg. Co., 188 Fed. 850.
Burns v Burns, 137 Fed. 801.
San Francisco Water Co. v Pattee, 25 Pac. 135.
Mosier v Sinnott, 79 Pac. 742.

The Marks case is controlling here. The complaining party was asked to contribute, as he was in the present case, and he refused. The Court dismissed his action because he declined to join when opportunity was presented. An offer to let Buehler participate in bid See U.P. Ry v. Boyd, 228 U.S. 508 Opinion

Appellant invokes the maxim, "He that has committed iniquity shall not have equity" and cites 80 U. S. 517, and other cases bearing on the rule. We submit that the appellant fails to comprehend the reason of the cases. In the case cited the complainant was the fraudulent actor and brought his action asking equity to relieve him from his own wrong. "Iniquity" means absence of fair dealing and under the circumstances here prevailing the maxim justly applies to this complainant.

But appellant says the question of paying Black and Bell can await the final decree. It would be vain for the

court to direct the corporation to pay when complainant contends it does not exist, and the proof shows it is without assets, funds or credit and the plaintiff refuses to aid. The court will not make idle and useless decrees.

## XIV.

**Complainant has ratified all acts of Black and Bell and the judgment in the State Court.**

The complainant's bill as served demanded that the proceedings in the State Court be declared void (page 17). This was March 20, 1912 (page 19). Eight months thereafter complainant asked that this relief be stricken from the prayer of the bill (page 22) so that the move was made after deliberate consideration. This was necessary because if a constructive trust was to be impressed on the title Black and Bell must have title. This waived all allegations of the invalidity of the proceedings in the State Court. If the complainant recognizes the title in this manner he must admit the source from whence it came. He cannot repudiate it and at the same time say he wants it. If the proceedings and sale are void Black and Bell hold nothing from the corporation and their application for patents is their sole property. This is too apparent to excuse discussion.

No wrong is charged or proven against Black and Bell for spending $30,000.00 (principle and interest) to do annual assessment work, or for surveying and applying for patents. This could not be wrong for had they not ~~have~~ done it there would now be no claims and they would have been forfeited in 1908. There was no wrong in spending for machinery and development work the

$30,000 in the notes in the state suit. The complainant is here asking that he be given the benefit of these expenditures. Surely there could be no justice in this if he is not to participate in the expense, and especially when he was asked to join and refused.

The complainant's election brings him within the well settled rule of law, that one cannot accept that which is a benefit to him, and repudiate that which is not. He must take it or leave it as he finds it and electing to take the benefit he ratifies everything that goes with it. It is especially applicable to a judgment.

Carll v Oakley, 97 N. Y. 633.
In Re N. Y. C. & H. R. R. Co., 60 N. Y. 112, 116.
Alexander v Alexander, 104 N. Y. 643.

## XV.

**On this appeal complainant has abandoned the theory on which he tried the case.**

By reference to the opinion of Judge Neterer it will be seen that, upon the trial, no evidence of collusion was offered; there was no evidence that Black or Bell had any influence with the trustees; the evidence did show that complainant always knew the status of the company and urged the foreclosure, he now complains of (pages 78, 79). Complainant failed absolutely in his proof and in the briefs submitted practically abandoned the claim made in the bill. Upon the proof there was no other course open to him.

The evidence showed that in the year 1907 Black took an option on the Baldwin stock, notes and mort-

gage and sold same for $30,000. Complainant, upon this, claimed that Black should have given this money to the corporation and had he ~~have~~ done so it would have had money with which to pay its debts. This appears from the opinion of the Court (pages 76 to 80) and complainant's counsel made this claim the controlling factor of the case (page 80). That claim is absolutely abandoned on this appeal.

Courts will not permit parties to speculate upon the trial nor permit them to submit their case on one theory and when defeated to repudiate such theory and seek relief on grounds ~~inconsistent with nor~~ not urged upon the trial.

Quimby v Carhart 133 N. Y. 579, 583.

## XVI.

**Appellant's Argument.**

I.

Under this point appellant cites cases holding that where a court has not acquired jurisdiction, either by service of process or the appearance of the party, the judgment can be attacked when presented by one claiming a benefit under it. Surely a judgment rendered without such service or appearance would be a nullity.

The case here presented does not bring the appellant within the rule. The cases which he cites hold squarely that to attack the judgment direct proof must be made that the person against whom the judgment was taken was not served or did not appear.

Thompson v Whitman, 85 U. S. 464, 468.
Webster v Ried, 11 How. (U. S.) 460 opinion.

They are also authority to the effect that one may waive process and appear by an attorney. Shelton v Tiffin, 6 How. (U. S.) 186 opinion.

Here the company was served and admitted "due and timely service" (pages 121, 124) or proper service. Black was a trustee and general manager (page 99) and he employed Locke to appear for the company and look after its interest (page 95). Black was on the ground and as the other officers were in the east he was the one of all the officers to employ an attorney. It has long been settled that the general manager of a corporation can employ attorneys to represent it in all litigation.

Cook on stock, etc. 3rd Ed. Sec. 719.
10 Cyc 928.

~~Not only does~~ the law presumes such authority in the general manager, ~~but~~ and no proof was offered in this case showing lack of such authority. We doubt the competency of such proof in view of the legal presumption, but if the appellant desired to here urge it the offer could have been made. It is evident from the appellant's brief that he preferred to speculate and charge wrong doing in preference to getting the facts. He is here urging that Black retained Locke for the sole purpose of giving the Court jurisdiction over the corporation; there is not a particle of proof to warrant the assertion. It was known to the complainant, at the time of the trial, that McNutt, as president, had directed Black to employ counsel to appear in the case and to defeat the action if that could be done, and in any event to keep down the expenses. The

complainant did not want this proof and as jurisdiction will always be presumed the defendants were not called upon to supply the proof.

After Locke was retained he carefully examined the complaint and records of the company and concluded there was no defense (page 95). Upon the trial of this action the complainant proved that the corporation had the money on the Baldwin notes (page 102) and that Locke was right in his conclusion that there was no defense.

Not only did Locke act the part of an honorable and honest man, but the receiver did likewise. Fogarty, as permanent receiver, was presented with protests from minority stockholders; he talked with these stockholders and their attorneys and personally examined the law on the questions raised; he also examined into all of the claims and the legality of them (page 97). Nor did he stop with this, but presented to the court a petition setting out the claims of these stockholders, and asking directions thereon (pages 141, 143). The receiver was directed to investigate and report on these claims (page 150) and did so (page 151), and in these proceedings Locke appeared for the corporation (page 150). All of the objectors and attorneys were heard by the court, on confirmation of the sale (page 165), and all matters had the fullest publicity, and Locke appearing for the company opposed all applications of the plaintiff's attorney.

Appellant's counsel asserts on his brief that Locke made an appearance to give the court jurisdiction and then entirely dropped out of the case. We regret the necessity of having to refute such an assertion. Locke acted as such attorney two or three weeks before filing

an appearance (page 96). He filed a written appearance Jan. 30, 1909, (page 130), and appeared on the trial when the decree was made by the court (page 131). He appeared before the court with minority objectors February 20, 1909, (page 150); on the notice to confirm the sale, April 1, 1909, (page 164), and, upon the final hearing of the confirmation of sale April 5, 1909 (page 165). The fact being that from the time Locke was retained he appeared until all proceedings in the action had terminated.

Again appellant calls attention to Locke's evidence at page 96 of the transcript. Locke here referred to his written appearance (page 130) and this entitled him to notice of all subsequent proceedings in the case. It may be fair for appellant to call the court's attention to this and then assert that it was the sole appearance, and hence attention is called to the personal appearances above given.

Appellant states that Black employed attorney Sandidge to bring the action in the State Court for Bell. We ask the Court's attention to the record on this (page 109). Bell personally employed Sandidge, and did not know that Locke appeared for the company or that Fogarty was receiver until March, 1909 (pages 109, 110). This is undisputed and it is submitted that Bell could not be guilty of collusion or fraud in acts which he knew nothing of.

An examination of the record shows that Locke appeared on every hearing in opposition to moves made by the plaintiff's attorney and ~~with~~ the receiver who was always acting under instructions from the Court. If Locke was acting in collusion with Bell why was he not in consultation with Bell's attorney? The record does not show

a single talk between Locke and Sandidge or correspondence between them. To have collusion there must have been some agreement and there is no evidence of this.

Appellant urges that the motion for a temporary receiver was returnable December 9, 1908, but not heard until the 10th. There is no evidence on this fact, but the record proof. These show that the motion papers were filed on the 9th (page 124). The order was made the 10th (page 127) and recites that the "cause came on regularly for hearing" (page 125), so it must be assumed that the moving papers were duly presented and filed on the 9th, as the record shows, and the application held or postponed to and acted upon the 10th. This is the usual course and a proper practice. The papers having been filed on the 9th gave the Court jurisdiction of the application and it could hold or adjourn the motion as it saw fit.

The appellant urges that the permanent receiver never gave a bond, and because thereof he had not power to sell. This contention overlooks the record. The bond given by the temporary receiver was conditioned for "performance of the trust reposed in him by said order (temporary receiver) or that may be reposed in him by any other order or decree in the premises" (page 128). The "premises" referred to the action of Bell against the corporation (page 127) and there could be but one "decree" in the action and that for a receiver and sale of the property as prayed for in the complaint (page 118). There was but one decree in the action (page 131) which provided for the bond and approved the one already in the case (page 133) and which clearly covered the case. The object of the bond is that the receiver have a surety and

in the bond given by the Surety Company it stood as surety for Fogarty for any trust to be reposed in him by any order or decree which the court made, past or future. The bond given was clearly intended to cover the action to the end, and had Fogarty ~~have~~ defaulted as permanent receiver the surety would have been liable. The bond given fully covered the requirements, both in letter and spirit, and the surety could not escape liability on the ground urged by appellant or otherwise.

## XVII.

**Judgment should be affirmed with costs.**

FRANK L. BELL,

Attorney in person for defendant Bell,

Glens Fals, N. Y.